

Before the  
Administrative Hearing Commission  
State of Missouri



MUMTAZ LALANI,

Petitioner,

vs.

DIRECTOR OF REVENUE,

Respondent.

No. 11-1733 RG

**DECISION**

Mumtaz Lalani owes the tax as assessed by the Director of Revenue (“the Director”), a penalty of \$8,261.84, and interest as allowed by law.

**Procedure**

On August 23, 2011, Lalani filed a complaint appealing the Director’s decision assessing tax, interest, penalties and costs. On September 19, 2011, the Director filed an answer. After granting several motions for continuance, we held a hearing on April 19, 2013. Legal Counsel Christopher R. Fehr represented the Director. Jeffrey S. Damerall represented Lalani. The matter became ready for our decision on August 1, 2013, the date the last written argument was filed.

## **Findings of Fact**

1. Lalani owned and operated Mid America Wholesale d/b/a Price Point Product and sold tobacco products to retailers. In 2006, Lalani was licensed as a wholesaler for other tobacco products than cigarettes (“OTP”).

2. In 2006, Lalani was fined for purchasing OTP from an out-of-state wholesaler and failing to pay taxes on the purchases.

3. Lalani contacted the Director’s employee Kaidy Martin, Revenue Processing Technician I, Excise Tax, for clarification and information about purchasing OTP. Lalani understood Martin to say that he would not have to pay tax on OTP as long as he purchased products from Missouri wholesalers.

4. On February 10, 2009, when Lalani was applying for a license a second time, Martin sent him a fax stating:

If you purchase form [sic] a licensed wholesaler you don’t need a license. If you purchase from a [sic] unlicensed wholesaler you will need a license. Since you now have a license you will need to file the monthly reports that I sent with the license. This way we can make sure the tobacco tax has been paid on the tobacco product.<sup>[1]</sup>

5. Between June 2009 and August 2010, Lalani purchased OTP from Rock Bottom Wholesale, 1120 Howard Street, St. Louis, Missouri. Rock Bottom is a Missouri wholesaler, not a manufacturer.

6. Rock Bottom issued receipts to Lalani for his purchases of OTP. The receipts listed a separate tax amount of \$0.00, and included the statement, “Tobacco Tax is automatically added for MO coustomers [sic].”<sup>2</sup>

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<sup>1</sup> Petitioner’s ex. B.

<sup>2</sup> Petitioner’s ex. A.

7. Rock Bottom did not pay taxes on all of its transactions, and the Director was investigating it. Rock Bottom reported that no tax was paid by Lalani on his purchase of tobacco products.

8. Lalani reported zero sales for the relevant periods when he had purchased tobacco products from Rock Bottom. During that period, he sold OTP to retailers and did not pay tax on the OTP. About 50% of Lalani's sales to retailers consisted of OTP. Lalani's profit margin for OTP is between 2% and 3% over the purchase price.

9. On July 20, 2011, the Director assessed Lalani for the unpaid tobacco taxes in the amount of \$42,863.19 for the period June 2009 through August 2010.

### **Conclusions of Law**

We have jurisdiction to hear this case.<sup>3</sup> Lalani has the burden of proof that he does not owe the tax assessed.<sup>4</sup>

#### **I. Tax**

Section 149.160 imposes a tax upon the first sale of tobacco products:

1. A tax is levied upon the first sale of tobacco products, other than cigarettes, within the state. The tax on tobacco products shall be at the rate of ten percent of the manufacturer's invoice price before discounts and deals, and shall be paid by the person making the first sale within the state. Licensed persons making first sales within the state shall be allowed approved credit for returned merchandise provided the tax was paid on the returned merchandise and the purchaser was given a refund or credit. Such licensed person shall take such approved credit on the return for the month in which the purchaser was given the refund or credit.

The parties agree that this is a case of first impression, and that this statute has "never been construed in any appellate decision, and no administrative regulation has ever been

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<sup>3</sup> Sections 144.261 and 621.050.1. Statutory references, unless otherwise noted, are to the 2000 Revised Statutes of Missouri.

<sup>4</sup> Section 621.050.2.

promulgated to construe the statute.”<sup>5</sup> Our research confirms this assertion. Comparison with other states’ laws is not helpful because the definitions of the terms used are different than those in Missouri.<sup>6</sup>

Lalani makes three arguments that he is not liable for the tax as assessed.

#### A. Estoppel

Lalani argues the Director is estopped from assessing the tax because he relied on representations from the Director’s employee. We believe Lalani was under the impression that he did not owe the tax, but we have not found that this was Martin’s advice. Whatever he understood, none of Lalani’s exhibits supports his assertions that Martin told him that he would not owe any tax if he purchased the OTP from a Missouri source.

Even if Martin made such a representation, we would not have the authority to estop the Director from assessing the tax. In *Twelve Oaks Motor Inn, Inc. v. Strahan*,<sup>7</sup> the court set forth factors to prove estoppel against a government agency:

1) a statement or act by the government entity inconsistent with the subsequent government act; 2) the citizen relied on the act; and 3) injury to the citizen. In addition, the governmental conduct complained of must amount to affirmative misconduct.

The *Twelve Oaks* court found the State Tax Commission was estopped from refusing to accept an appeal filed within the time deadline that it had specified in its own instruction. The court weighed exceptional circumstances and manifest injustice<sup>8</sup> to fashion an equitable relief. As an administrative agency, however, we have no authority to apply the doctrines of equity.<sup>9</sup>

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<sup>5</sup> Joint Proposed Pre-Hearing Order, filed January 15, 2013.

<sup>6</sup> See *Calvert v. Zanes-Ewalt Warehouse, Inc.*, 502 S.W.2d 689 (Tex. 1974) (“first sale” included loss by negligence, theft or other unaccountable loss).

<sup>7</sup> 110 S.W.3d 404, 408 (Mo. App., S.D. 2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940).

In addition, neither the Director, his employees, nor this Commission has the power to change the law.<sup>10</sup> If the law imposes a tax on Lalani, nothing the Director or his employee does can change this.

### B. Statute is Unconstitutional

Lalani argues that § 149.160 is unconstitutionally vague. This Commission does not have authority to decide constitutional issues.<sup>11</sup> We have no authority to declare a statute unconstitutional.<sup>12</sup> The issue has been raised and may be argued before the courts if necessary.<sup>13</sup>

### C. First Sale

Section 149.011 provides the following definitions:

(5) **“First sale within the state”**, the first sale of a tobacco product by a manufacturer, wholesaler or other person to a person who intends to sell such tobacco products at retail or to a person at retail within the state of Missouri;

(6) **“Manufacturer”**, any person engaged in the manufacture or production of cigarettes;

(7) **“Manufacturer’s invoice price”**, the original net invoice price for which a manufacturer sells a tobacco product to a distributor, wholesaler or first seller in the state as shown by the manufacturer’s original invoice;

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(10) **“Person”**, any individual, corporation, firm, partnership, incorporated or unincorporated association, or any other legal or commercial entity;

(11) **“Retailer”**, any person who sells to a consumer or to any person for any purpose other than resale;

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<sup>10</sup> *Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985).

<sup>11</sup> *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002); *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999); *Williams Cos. v. Director of Revenue*, 799 S.W.2d 602, 604 (Mo. banc, 1990); *Fayne v. Dept. of Soc. Serv’s*, 802 S.W.2d 565 (Mo. App., W.D. 1991).

<sup>12</sup> *State Tax Comm’n v. Admin. Hearing Comm’n*, 641 S.W.2d 69 (Mo. banc 1982).

<sup>13</sup> *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App., W.D. 1993).

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(18) **“Wholesaler”**, any person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes or tobacco products to, and render service to, retailers in the territory the person, firm or corporation chooses to serve; that purchases cigarettes or tobacco products directly from the manufacturer; that carries at all times at his or its principal place of business a representative stock of cigarettes or tobacco products for sale; and that comes into the possession of cigarettes or tobacco products for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail the cigarettes or tobacco products to consumers. This shall include any manufacturer, jobber, broker, agent or other person, whether or not enumerated in this chapter, who so sells or so distributes cigarettes or tobacco products.

Lalani argues that the “first sale” has a “first seller” and a “first buyer.” Under § 149.160.1, the tax is owed by the first seller. Lalani argues that the first sale in the state was the sale to him from Rock Bottom. While, in actuality, this may be true, such transaction fails to come within the definition in § 149.011(5), which defines a “first sale within the state” as occurring between a manufacturer, wholesaler, or other person *to a person who intends to sell the OTP at retail*. Thus, while Rock Bottom may be a wholesaler, its sales of OTP to Lalani do not meet the definition of a “first sale” because Lalani does not sell OTP at retail. Therefore, the sale of OTP by Rock Bottom to Lalani was not a “first sale.”

Lalani next argues he was not acting as a wholesaler in this instance because a wholesaler purchases from a manufacturer, and Rock Bottom was not the manufacturer. That may be true, but it does not end the analysis of whether Lalani was the first seller and owes the tax. The status of the seller of OTP is not determinative of whether a “first sale” has occurred under § 149.160.

Lalani argues he could not be considered the first seller because he did not purchase the OTP from the manufacturer. Section 149.011(5) defines the “first sale within the state” as being

made by a “manufacturer, wholesaler or other person[.]” Lalani argues that “other person” does not mean **any** other person, but a person who either manufactures the OTP or buys directly from the manufacturer. We reject his argument as inconsistent with the clear legislative intent in this statute, which broadened the concept of a “first seller” beyond a manufacturer or wholesaler (already a broad term as defined above) to include *any person who sells to a retailer*. Regardless of his status, Lalani sold the OTP to a person who intended to sell such tobacco products at retail or to a person at retail within the state of Missouri. Therefore, such sale by Lalani was the “first sale within the state” as defined in § 149.011(5).

Lalani further argues that the tax is based on the rate of ten percent of the manufacturer’s invoice price, and that someone in his position – who is not a manufacturer or does not buy directly from the manufacturer – would not even know that invoice price.<sup>14</sup> We acknowledge the difficulty Lalani may face in determining the invoice price when his purchases are not directly from the manufacturer, but that does not change either the status of his purchases from Rock Bottom, or his sales to retailers.

Finally, Lalani argues that his profit on the OTP is less than the ten percent tax that would be assessed. Again, this may be true, but it does not change the characterization of his sales of OTP to retailers as “first sales within the state.” Lalani – not the Director or the legislature – is solely responsible for determining an appropriate mark-up on his sales at retail. We find that Lalani, not Rock Bottom, made the “first sale within the state” of the OTP. Therefore, Lalani owes the tax under § 149.160.1 in the amount of \$33,047.34.

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<sup>14</sup> This is part of Lalani’s argument that the statute is unconstitutional.

## II. Penalty and Interest

Section 149.190.3 provides:

Any person responsible for the tax imposed in section 149.160 who fails to pay such tax within the time and manner required by law, shall pay, as part of the tax imposed, a penalty equal to twenty-five percent of the tax liability and the tax shall bear interest at the rate established in section 32.065, RSMo.

Lalani was assessed a penalty of \$8,328.11. Twenty-five percent of \$33,047.34 is \$8,261.84.

Lalani owes interest as provided by law.

### **Summary**

Lalani owes the tax as assessed by the Director, a penalty of \$8,261.84, and interest as allowed by law.

SO ORDERED on March 19, 2014.

/s/ Mary E. Nelson

MARY E. NELSON  
Commissioner